Supreme Court, U.S.
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No. 01-679

IN THE

Supreme Court of the United States

GONZAGA UNIVERSITY AND ROBERTA S. LEAGUE,
Petitioners,

v.

JOHN DOE,
Respondent.

On Writ of Certiorari
to the Supreme Court of Washington

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

The Family Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. § 1232g(b)(2), provides, *inter alia*, that "[n]o funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records [other than as permitted elsewhere in the statute], unless * * * there is written consent" from the parents or adult student "specifying records to be released, the reasons for such release, and to whom, and with a copy of the records to be released" to the parent. 20 U.S.C. § 1232g(b)(2)(A). The question presented is:

Whether respondent has a cause of action against petitioners for damages under 42 U.S.C. § 1983 to vindicate his right under 20 U.S.C. § 1232g(b) to withhold consent and prevent the unauthorized release of personally identifiable information from his education records.

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Diane Divoky, *How Secret School Record Can Hurt Your Child*, Parade Magazine (Mar. 31, 1974) 29
1 Francis Hilliard, *The Law of Contracts* (1882) ... 48

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National Committee for Citizens in Education, J. William Rioux & S. A. Sandow, *Children, Parents and School Records* (May 1974) 28
1 William Story, *A Treatise on the Law of Contracts* (M. Bigelow ed. 1874) 48
2 Francis Wharton, *A Commentary on the Law of Contracts* (1882) 48

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g (FERPA) (2000), as amended by Pub. L. No. 107-56, § 507,115 Stat. 367 (2001), is reproduced in the appendix to this brief at 2a-15a. Relevant provisions of certain other sections of Title 20 of the United States Code are reproduced in the appendix to this brief as follows: 20 U.S.C. § 1221 (App., *infra*, 1a); 20 U.S.C. § 1232i (App., *infra*, 16a); 20 U.S.C. §§ 1234 to 1234g (App., *infra*, 17a-26a). In addition, Section 1983 of Title 42 of the United States Code is reproduced at Pet. Br. 1a; the current FERPA regulations (34 C.F.R. §§ 99.1 - 99.67) are reproduced at Pet. Br. 17a-45a; and portions of the Washington Administrative Code (1997), are reproduced at Pet. Br. 46a-52a.

STATEMENT

A. *Statutory Framework*

Congress enacted the Family Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. § 1232g, to require recipients of federal educational program funds to impose certain limits on the release of personally identifiable information from students' education records. Subsection (a) of FERPA addresses the "inspection and review of education records" by parents,[1] providing, *inter alia*, that "[n]o funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students

---

[1] The statutory text uses the term "parents," but a student, like respondent, who attends a postsecondary institution or is 18 years of age or older, is accorded the rights that generally are accorded parents. *See* 20 U.S.C. §§ 1232g(d); 1232g(e). We use the term "parents" to include both parents and students who are accorded parental rights. We also refer, however, on occasion to "adult students" to mean students, like respondent, who attend postsecondary institutions or are 18 years of age or older.

* * * the right to inspect and review the education records of their children." 20 U.S.C. § 1232g(a)(1)(A); *see also* 20 U.S.C. § 1232g(a)(2).

Subsection (b) of FERPA—the subsection at issue in this case—limits the transferability of education records without parental consent. Paragraph (1) of subsection (b) provides that "[n]o funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in [20 U.S.C. § 1232g(a)(5)]) of students without the written consent of their parents to any individual, agency, or organization, other than to" a long list of officials, pursuant to statutorily specified circumstances. 20 U.S.C. § 1232g(b)(1).

Paragraph (2) of subsection (b) details the right of parents, in certain circumstances, to withhold consent and prevent the release of education records. It provides, in relevant part:

> No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information, in education records other than directory information, or as is permitted under paragraph (1) of this subsection, unless—
>
> (A) there is written consent from the student's parents specifying records to be released, the reasons for such release, and to whom, and with a copy of the records to be released to the student's parents and the student if desired by the parents * * *.

20 U.S.C. § 1232g(b)(2)(A).

FERPA also authorizes the Secretary of Education to enforce FERPA and deal with statutory violations (20 U.S.C. § 1232g(f)), and directs the creation of an office and review board to investigate, process, review, and adjudicate statutory violations and complaints (20 U.S.C. § 1232g(g)). Other FERPA provisions address certain other releases of education record information and recordkeeping requirements.

B. *Factual And Procedural Background.*

1. Respondent, John Doe, is a former undergraduate student in the teacher education program of the school of education at petitioner Gonzaga University. Petitioner Gonzaga University is a private university in Spokane, Washington, which, as a recipient of funds under applicable federal educational programs, is subject to the requirements of FERPA. Pet. App. 2a; Pet. 3; *see* Br. in Opp. 11 n.4. Petitioner Roberta League is the teacher certification specialist in Gonzaga's department of education. Pet. App. 2a.

In March 1994, respondent received a telephone call asking him to report to the dean's office of the school of education. When he met with the dean, respondent was "escorted to a private room and left to read a letter from" the dean explaining that, "in light of allegations of sexual assault," the dean would not give respondent the moral character affidavit required by the State of Washington in support of any teacher certification application he might submit. Pet. App. 6a-7a; *see id.* at 23a. When respondent asked what the allegations were, the dean refused to provide any information, including the identity of the individual who purportedly made the allegations. *Id.* at 7a. When respondent and his parents later asked about their appeal rights, "they were told there were none." *Ibid.*

Ultimately, respondent learned that the dean's decision was based on an investigation conducted by petitioner Roberta League and other department members over the preceding several months. That investigation had begun when League overheard two students talking in October 1993 about an incident that allegedly had occurred approximately one year earlier involving respondent and Jane Doe, a fellow teacher education student. Pet. App. 2a. Respondent and Jane Doe

had a sexually intimate relationship in late 1992. *Ibid.* League overheard one of the students expressing her dissatisfaction with how the school handled date rape complaints and that student told her friend that Jane Doe had claimed that having sex with respondent caused her physical pain. The student "was angry that no one from Gonzaga had bothered to find out what had happened." *Ibid.*

League recognized respondent's name as that of a student in the school of education and conveyed what she had overheard to Dr. Susan Kyle, the director of field experience for student teachers. The two of them launched their own investigation of the matter which eventually involved 19 Gonzaga staff members. Pet. App. 3a. At the outset of their investigation, on October 14, 1993, petitioner League and Kyle asked the student whom League had overheard to approach Jane Doe to ask if she would speak with them about her relationship with respondent. *Id.* at 4a. Notwithstanding the fact that the student told the staff members that Jane Doe had denied the rape allegations the preceding year, the student agreed to speak with Jane Doe again. *Id.* at 33a. Jane Doe "became angry and told [the student] that she did not want to make a complaint." On October 28, 1993, Kyle herself met with Jane Doe and discussed the situation, but Jane Doe refused to make a formal statement. *Id.* at 5a. A professor met Jane Doe in the hallway after she left Kyle's office and, according to that professor, Jane Doe was near hysteria and made more allegations about respondent, including that he had threatened her life. *Ibid.*

In October 1993, petitioner League also contacted the Washington State Office of the Superintendent of Public Instruction (OSPI), which regulates teacher education programs. Pet. App. 5a. Petitioner spoke to Adelle Nore, a senior investigator in OSPI, and informed her about the allegations that a student may have engaged in sexual misconduct. *Ibid.* Petitioner and other Gonzaga personnel subsequently spoke with that state official on numerous

occasions and informed her of respondent's identity. *Ibid.* Gonzaga had a practice by which "Gonzaga personnel routinely called OSPI, before a student's application for certification was submitted," to talk about students and to obtain advice. *Id.* at 19a.

In February 1994, the dean of the school of education met with petitioner League and others and concluded that there was sufficient evidence of a serious behavioral problem that would preclude her from signing an affidavit in support of any teacher certification application that might be made by respondent. That conclusion by the dean resulted in the letter she presented to respondent. Pet. App. 6a.

2. In June 1994, respondent brought a civil action in state court against Gonzaga University, alleging defamation, breach of educational contract, and negligence. He later sued petitioner League and other school officials and the cases were consolidated. Pet. App. 8a. Thereafter, respondent amended his complaint to add a claim under 42 U.S.C. § 1983 for violation of 20 U.S.C. § 1232g(b)—the parental (or adult student) consent requirement of FERPA—based on Gonzaga's release, without respondent's consent, of personally identifiable information from his education records, pursuant to petitioners' policy or practice of releasing such information to the OSPI. *See also* Br. in Opp. 6-9 (further describing procedural history that led to amendment of complaint, as well as history of cross-claims and counter-claims).

The case proceeded to trial in March 1997. Pet. App. 9a. Jane Doe, testifying through depositions, explained that some things had happened during her relationship with respondent that made her uncomfortable, but respondent had not sexually assaulted her. *Id.* at 7a. She testified that the student who first talked about the relationship had "really blown things out of proportion," that there were falsehoods in the various declarations of the staff, that the department chairperson "wasn't interested in hearing anything other than what she

already believed," and that she, Jane Doe, had told the dean that Gonzaga personnel were "wrong in their assumptions" about what had happened in her relationship with respondent. *Ibid.*

Respondent also testified about the relationship between him and Jane Doe, explaining that sexual intercourse had occurred but was never forced, and that the declarations by the Gonzaga personnel contained many lies. Pet. App. 7a-8a. He also testified that petitioners destroyed his teaching career. *Id.* at 8a. Respondent's roommates testified that they never heard or observed anything to indicate that Jane Doe was unwilling to engage in sexual intercourse. Two of respondent's former girlfriends testified that he never pressured them to engage in sexual activity. *Id.* at 7a-8a.

The jury returned a verdict in respondent's favor, awarding him damages in the amount of $500,000 for defamation; $100,000 for invasion of privacy; $150,000 for violation of FERPA rights; $300,000 punitive damages for the FERPA violation; $55,000 for breach of educational contract; and $50,000 for negligence. Pet. App. 9a.

3. The Court of Appeals of Washington reversed certain rulings on discovery, evidence, and jury instructions and remanded for a retrial on the defamation claim. Pet. App. 30a-53a. The court ruled that the trial court erred in failing to grant petitioners a directed verdict on all of the remaining claims, including the FERPA claim. *Id.* at 39a-49a. The court held that FERPA does not create a right that individuals can enforce under 42 U.S.C. § 1983 and that, even if it did create such a right, a teacher candidate waives the right by applying for teacher certification. *Id.* at 44a-48a.

4. The Supreme Court of Washington granted respondent's petition for review, Pet. App. 10a, and subsequently affirmed in part and reversed in part, *id.* at 1a-28a. The court remanded the case for reinstatement of the judgment, except on the negligence claim, which it ordered dismissed. *Id.* at 2a.

With regard to the FERPA claim, the court found that "[s]ubstantial evidence supports a determination that Gonzaga had a 'policy or practice' of disclosing personally identifiable information contained in education records—in violation of FERPA." Pet. App. 19a. The court also held that the FERPA provision at issue here creates individual rights that are privately enforceable under Section 1983. *Id.* at 20a-21a. The court ruled that the FERPA provision limiting the release of records without consent met the three-factor test recently articulated by this Court in *Blessing* v. *Freestone*, 520 U.S. 329 (1997). Pet. App. 20a. The court also pointed to rulings by four federal courts of appeals holding that FERPA creates rights privately enforceable under Section 1983. *Id.* at 21a & n.12 (citing cases). The court concluded that there was substantial evidence to support the jury findings that the trial defendants deprived respondent of his federal statutory right under FERPA and were acting under color of state law. *Id.* at 21a-23a. The court also reversed the alternative ruling that respondent had waived his FERPA right, noting that respondent had not yet submitted an application for teacher certification when petitioners disclosed the education record information to the state agency. *Id.* at 22a-23a.

5. On January 11, 2002, the Court granted the petition for a writ of certiorari, limited to the first question presented by the petition. 122 S. Ct. 865.

SUMMARY OF ARGUMENT

I. The Family Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. § 1232g(b), requires that an educational institution that receives federal educational program funds impose certain limitations on the release of personally identifiable information from student education records. Paragraph (1) of Section 1232g(b) prohibits an educational institution from having a policy or practice of permitting the release of education record information without written parental consent, other than to particular persons expressly

authorized by that provision. 20 U.S.C. § 1232g(b)(1)(A)-(J). Paragraph (2) addresses the circumstances where an educational institution, like petitioner Gonzaga, has a policy or practice of releasing personally identifiable information from education records to persons not authorized under paragraph (1). An institution may not release information "unless" there is prior written consent from the parents (or an adult student like respondent) for release of the particular information at issue, and the institution must provide the parents with a copy of the record intended for release, the reasons for the release, and the identity of the recipient. 20 U.S.C. § 1232g(b)(2)(A). Congress thereby accorded parents a right to withhold consent and prevent the release of education record information under Section 1232g(b)(2)(A).

Petitioners broadly declare that FERPA does not create any right enforceable under 42 U.S.C. § 1983. They do so in error, however, because they treat the statute as an "undifferentiated whole." *Blessing* v. *Freestone*, 520 U.S. 329, 342 (1997). When particularized analysis is given FERPA, it reveals that Congress intended "that the provision in question benefit the plaintiff;" that the right claimed is "not so 'vague and amorphous' that its enforcement would strain judicial competence;" and that the statute "unambiguously impose[s] a binding obligation," that is mandatory rather than precatory. *Id.* at 340-341 (citations omitted). The detailed nature of the consent required evidences Congress' intent that parents be treated in a particular manner to satisfy their need to make an informed decision about whether the requested release would be in the best interests of their child. *See id.* at 343. That the parental consent requirement of paragraph (2) applies only to an educational institution that has a policy or practice of releasing education record information to persons other than those authorized under paragraph (1), does not transform the parental consent requirement into a prohibition against a policy or practice. Rather, that limitation ensures that an educational institution that does not have such a policy or

practice, but inadvertently releases education record information based, for example, on the mistaken belief that the release is authorized under paragraph (1), does not violate FERPA. Moreover, the statutory scheme and legislative history of FERPA provide further evidence of Congress' intent to create a parental right to withhold consent and prevent the release of education record information under Section 1232g(b).

II. FERPA's limited administrative scheme is not sufficiently comprehensive to supplant respondent's Section 1983 action. *See Blessing*, 520 U.S. at 346. The administrative scheme does not afford parents a tribunal, either administrative or judicial, to redress an individual claim. Under the scheme, parents have a right only to file a complaint with the Department of Education's Family Policy Compliance Office (FPCO), 34 C.F.R. § 99.63, and to be informed about the disposition of the complaint. *Id.* at § § 99.65, 99.66(b), 99.67(b). FPCO does not adjudicate individual complaints. *See id.* at. § 99.60(b)(1) and (2). A Section 1983 action to remedy respondent's claim is not incompatible with that administrative scheme.

III. Petitioners' arguments for application of a standard different from the *Blessing* analysis are without merit. Petitioners' arguments confuse a federal right that is enforceable under 42 U.S.C. § 1983, with the creation by a court of an implied cause of action. When a court infers an implied cause of action, that cause of action and the remedies available thereunder are, by definition, indeterminate in scope and may raise separation of powers concerns. Those concerns do not arise here because this case involves an express cause of action under 42 U.S.C. § 1983, which is limited in a variety of ways. Finally, petitioners' argument based on Nineteenth Century contract law is misplaced and does not warrant overruling more than two decades of this

Court's precedent, holding that an individual may sue under Section 1983 to enforce federal rights conferred by Spending Clause legislation.

ARGUMENT

I. CONGRESS CREATED A RIGHT UNDER FERPA, 20 U.S.C. § 1232g(b), OF PARENTS TO WITHHOLD CONSENT AND PREVENT RELEASE OF EDUCATION RECORD INFORMATION AND THAT RIGHT IS ENFORCEABLE UNDER 42 U.S.C. § 1983

Section 1983 imposes liability on "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage of any State * * * subjects, or causes to be subjected," any person within the United States "to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws * * *." 42 U.S.C. § 1983. It specifies that every such person shall be "liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress * * *." 42 U.S.C. § 1983. Section 1983 thereby safeguards the rights that are conferred on a person by the Constitution and other federal statutes. *Maine* v. *Thiboutot*, 448 U.S. 1, 4 (1980). Whether another federal statute establishes an individual right that is enforceable under Section 1983 is a question that this Court has addressed in the context of numerous statutes over the past several years.

Most recently, in *Blessing* v. *Freestone*, 520 U.S. 329 (1997), the Court addressed the question whether individuals may sue under Section 1983 for violations of Title IV-D of the Social Security Act, 42 U.S.C. § § 651-669b. The Court reaffirmed its three-factor inquiry to determine whether a particular statutory provision gives rise to a federal right enforceable under Section 1983: (1) whether Congress intended "that the provision in question benefit the plaintiff;" (2) whether the right claimed to be protected by the statutory provision is "not so 'vague and amorphous' that its enforcement would strain judicial competence;" and (3) whether the statute "unambiguously impose[s] a binding obligation" such that the provision is "couched in mandatory rather than precatory terms." *Blessing*, 520 U.S. at 340-341 (citing *Wright* v. *Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 430-432 (1987), and *Wilder* v. *Virginia Hosp. Ass'n*, 496 U.S. 498, 510-511 (1990)).

Examination of the text, structure, and history of FERPA, 20 U.S.C. § 1232g(b), under the *Blessing* analysis, demonstrates that Congress intended to create an individualized right of parents to withhold consent and prevent the unauthorized release of education record information by an educational institution like petitioner Gonzaga that has a policy or practice of releasing such information.[2]

A. Section 1232g(b)(2) Gives Rise To A Federal Right Under *Blessing*

1. Petitioners broadly declare that the Family and Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. § 1232g, does not create any rights enforceable under Section 1983. Pet. Br. 21-23; 32-35. Their argument is rooted in general assertions that "FERPA's operative provisions" are not "phrased in terms of individual rights" (*id.* at 21), and that "FERPA's language and structure do not confer individual rights" (*ibid*). Petitioners do not distinguish adequately, however, between the various provisions of FERPA. Instead, they treat the statute as an "undifferentiated whole," contrary to the particularized analysis mandated by *Blessing*. 520 U.S. at 342. In *Blessing*, the Court held that it

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[2] We use the term "educational institution" to refer to an "educational agency or institution" as that term is defined in FERPA to mean "any public or private agency or institution which is the recipient of funds under any applicable program." 20 U.S.C. § 1232g(a)(3). Applicable programs include most of the programs for which the Secretary or the Department of Education has administrative responsibility. *See* 20 U.S.C. §§ 1221(c)(1), 1234i.

is error to use a "blanket approach" to determine whether a general statutory scheme creates rights enforceable under Section 1983. *Id.* at 344. Rather, consideration must be given to the specific claim and the particular statutory provision on which it rests. *Id.* at 342-343.

Petitioners acknowledge (Br. 22) that respondent's Section 1983 cause of action rests on an allegation of a violation of respondent's rights under Section 1232g(b), but they nowhere analyze the complete statutory text to determine whether it creates the individual right respondent seeks to enforce. The quotations of the statutory text by petitioners and their *amici* omit the relevant language in paragraph (2) of Section 1232g(b) that specifically grants parents (and adult students) the right to withhold consent and prevent the unauthorized release of education record information by an educational institution that has a policy or practice of releasing, or providing access to, such information. *See* Pet. Br. 3-5, 21; U.S. Br. at 2. But paragraphs (1) and (2) of Section 1232g(b) are not the same.

Paragraph (1) of Section 1232g(b), which is the sole focus of petitioners' statutory analysis, provides, in relevant part, that federal educational program funds shall not be available to any educational institution "which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information * * *) of students without the written consent of their parents to any individual, agency, or organization, other than to" those specifically listed in paragraph (1), which includes a host of state, local, and federal educational and law enforcement officials. *See* 20 U.S.C. § 1232g(b)(1)(A)-(J). Section 1232g(b)(1) means that an educational institution may have a policy or practice of releasing education records and personally identifiable information contained therein, without parental consent, to such specifically authorized persons and entities, but not to others.

Paragraph 2 of Section 1232g(b) begins with language similar, but not identical, to paragraph (1), and continues after that language with a critical subparagraph that is introduced with the directive "unless." Section 1232g(b)(2) provides, in relevant part:

> [n]o funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information, or as is permitted under paragraph (1) of this subsection, unless—
>
> (A) there is written consent from the student's parents specifying records to be released, the reasons for such release, and to whom, and with a copy of the records to be released to the student's parents and the student if desired by the parents * * *.

20 U.S.C. § 1232g(b)(2)(A).

Congress clearly said something quite different in paragraph (2) than it did in paragraph (1). Paragraph (2) says that an educational institution that has a policy or practice of releasing, or allowing access to, personally identifiable information in education records to persons other than those authorized in paragraph (1), must obtain the consent of parents in the particular manner described in subparagraph (A) or meet the standard set forth in (B) (regarding judicial orders). The institution may not release such information "unless" one of the standards is met.

2. Petitioners' abbreviated consideration of the statutory text leads them repeatedly to claim that "the statute merely conditions the availability of federal funds on an institution not having specified policies or practices" (Pet. Br. 21; *see also id.* at 2, 3, 9, 22), and that the statute reflects congressional concern only "with systemwide performance" (*id.* at 22). *See also* U.S. Br. 4-5, 13-16. Thus, they argue

that, under FERPA, "particular individuals are not accorded an entitlement to be treated in any particular manner." Pet. Br. 22.

The plain language of Section 1232g(b)(2) belies those arguments. It makes clear that Congress focused directly on parents and afforded them (and adult students) an individualized right to withhold consent and prevent the unauthorized release of personally identifiable information in education records by an educational institution that has a policy or practice of releasing, or providing access to, such information. 20 U.S.C. § 1232g(b)(2). Moreover, Congress detailed the individualized manner in which the right is to be accorded parents, 20 U.S.C. § 1232g(b)(2)(A), reflecting Congress' intent to ensure that "the needs of [a] particular person have been satisfied." *Blessing*, 520 U.S. at 343. Also, Section 1232g(b)(2) is explicitly "focus[ed] on the individual"—the parents. *Wright*, 479 U.S. at 430; *see also Wilder*, 496 U.S. at 510.

Section 1232g(b)(2) does not prohibit an educational institution from having a policy or practice. Nor does it require that any educational institution have a policy or practice. Rather, Section 1232g(b)(2) addresses the circumstance where an educational institution has a policy or practice of releasing personally identifiable information from education records to persons not authorized under Section 1232g(b)(1) and, by virtue of Section 1232g(b)(1), cannot do so without parental consent. Section 1232g(b)(2) conditions such an institution's authority to make such releases, not on a policy or practice of the institution in seeking or obtaining parental consent, but on there being, in fact, individualized, prior written parental consent. It requires that an educational institution treat a particular individual (parents) in a particular manner (providing them with copies of records, reasons for a release, and identity of recipient) and mandates that it obtain

prior written consent for each otherwise unauthorized release. 20 U.S.C. § 1232g(b)(2)(A).

That the parental consent requirement applies only to an educational institution that has a policy or practice of releasing education record information to persons other than those authorized under Section 1232g(b)(1) does not transform the parental consent requirement into a prohibition against a practice or policy, as petitioners contend (Pet. Br. 21-22). Rather, Congress' limited application of the written parental consent requirement protects educational institutions that do not intend to allow release of education record information to anyone other than those authorized under Section 1232g(b)(1). That limitation ensures that an educational institution that does not have such a policy or practice, but inadvertently releases education record information based, for example, on the mistaken belief that the release is authorized under Section 1232g(b)(1), does not violate FERPA. *Cf. Monell* v. *New York City Dep't of Social Servs.*, 436 U.S. 658, 690-695 (1978). If, however, an educational agency does have a policy or practice of releasing education record information beyond those authorized under Section 1232g(b)(1) (as petitioners did, *see* Pet. App. 19a), it is charged with complying with the written parental consent requirement of Section 1232g(b)(2)(A).

3. Congress' intent to accord individual parents (and adult students) an entitlement to be treated in a particular manner under Section 1232g(b)(2) is evident from the detailed nature of the parental consent required. *Cf. Blessing*, 520 U.S. at 342-344. Like the statute before the Court in *Wilder*, Section 1232g(b)(2) "set[s] forth in some detail the factors to be considered." *Suter* v. *Artist M.*, 503 U.S. 347, 359 (1992) (describing *Wilder* 496 U.S. at 519 n.17). By specifying the information an educational institution must provide to parents from whom they seek consent for an otherwise unauthorized release of their children's education records, Congress

demonstrated its intent to address "whether the needs of [a] particular person have been satisfied." *Blessing*, 520 U.S. at 343. The detailed nature of the consent requirement is designed to satisfy the needs of parents to make a meaningful judgment about whether permitting a particular release of education record information is in their child's best interests.

For example, Congress' requirement that the records to be released be specifically identified and a copy given to the parents is aimed at the need of parents to understand the exact nature of the information at issue. Disclosure of the particular record provides the parents with actual knowledge of what information will be released if they grant consent, rather than forcing the parents to surmise based on the title or description of the record. Such disclosure may prove significant. For example, actual review of a document entitled "health and fitness record," may inform a parent that the record includes information he did not realize would be there, *e.g.*, psychological information, or information about physical or sexual development, or information about IQ testing. Disclosure to a parent, therefore, allows the parent to make an informed decision about whether consenting to release of a record based on its actual contents is in the best interests of their child. It is the parents, not the funding agency or the educational institution, to whom Congress granted the right to make that decision.

The instant case illustrates how Congress intended to benefit individual parents (and adult students) and how the detailed nature of the consent requirement addresses the needs of such individuals. If petitioners had provided respondent with a copy of the education record information it sought to release, the identity of the intended recipient of the information, and the reason for the release, respondent would have been able to request a hearing and correct the records or, at the very least, insert an explanation into the records, under 20 U.S.C. § 1232g(a)(2). Petitioners' request for

respondent's consent would have been the first opportunity for respondent to explain the situation to petitioners—an explanation petitioners may well have found credible. If respondent was not satisfied with any correction or explanation that he was allowed to insert, however, he could then have decided to prevent the release of the information by refusing his consent. Such a refusal would have had serious consequences for him, of course, because it likely would have meant that any application for a teacher certification that he might submit to the State would not have been approved. But, by refusing consent to the release of the information, respondent would have been able to prevent the added injury caused him by petitioners' release of the false and defamatory claim that he had been accused of sexual assault.

In sum, analysis of the full text of Section 1232g(b) demonstrates that respondent's case meets the first prong of the *Blessing* standard because Congress intended that the parental consent requirement benefit individual parents, their families and children. 520 U.S. at 340. Indeed, even absent any detailed analysis of Section 1232g(b)(2) the United States views the question whether Congress intended to benefit the putative plaintiff to be "a close one." U.S. Br. 9. As demonstrated above, that question is not a close one after analysis of the full statutory text.

4. The fact that Section 1232g(b)(2) is phrased as a prohibition on making educational program funds available to an educational institution unless it abides by the statutory requirements, does not, as the United States suggests, alter the result in this case. *See* U.S. Br. 11-12. The passage in *Cannon* v. *University of Chicago*, 441 U.S. 677, 690-691 (1979), on which the United States relies, does not compare the language of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, with a law that was structured "exactly" like FERPA's parental consent requirement. *See* U.S. Br. 12. Because the United States does not address the

text of Section 1232g(b)(2)(A), it fails to appreciate that provision's unmistakable focus on the benefited individuals. In contrast, the *Cannon* Court compared Title IX with laws "enacted for the general public," or written "simply as a ban on discriminatory conduct" by federal recipients, or "as a prohibition against the disbursement of public funds to educational institutions engaging in discriminatory practices." *Cannon*, 441 U.S. at 690-693. That is not how Congress structured the parental consent requirement of FERPA. Congress structured Section 1232g(b)(2)(A) to address the privacy interests of particular individuals—parents (and adult students)—not a right of the general public. By using the condition "unless" in Section 1232g(b)(2)(A), Congress placed the authority in the hands of individual parents, in certain circumstances, to determine whether education record information can be released by educational institutions.

Furthermore, the phrasing of Section 1232g(b)(2) does not alter the fact that, like other funding statutes, Congress imposed a duty of compliance on fund recipients. Congress' direction to the funding agency, that no funds shall be made available to educational institutions who engage in certain conduct, does not impose a primary duty on the funding agency to bar funding if a provision of the statute is violated, or a duty that removes responsibility for compliance from the educational institution. The statutory phrasing must be read in the context of other provisions of FERPA that do not allow the agency to terminate funding for a violation of FERPA unless the violator has been given an opportunity to comply voluntarily. *See* 20 U.S.C. § 1232g(f). In addition, the Secretary is authorized under the statutory scheme to seek compliance by an educational institution with the requirements of the law through any other means authorized by law, including a cease and desist order or a federal court action. *See* 20 U.S.C. §§ 1234(a), 1234c-1234f; *e.g.*, *United States* v. *Miami University*, 91 F. Supp. 2d 1132, 1134 (S.D. Ohio 2000), appeal pending, No. 00-3518 (6th Cir.) (United States

sued university to compel compliance with FERPA and cease disclosures of personally identifiable information without consent). Moreover, Congress has elsewhere made clear that it views FERPA, 20 U.S.C. § 1232g, as imposing duties on, and requiring certain conduct on the part of, educational institutions. *See* 20 U.S.C. § 1092(a)(1) (providing that certain educational institutions "shall, on an annual basis, provide to all enrolled students a list of the information that is required to be provided by institutions to students [regarding financial aid] and section 1232g of [Title 20]"). Finally, the rights-creating language in Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, on which the United States focuses, has not been present or required in other Section 1983 cases. *See*, *e.g.*, *Wright*, 479 U.S. at 420 (describing the Brooke amendment); *Wilder* 496 U.S. at 502-503 (describing the Boren amendment).[3]

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[3] The United States is mistaken in contending that, unlike in other Section 1983 cases, respondent did not sue "to obtain the benefit or service that the funding statutes support—namely, education." U.S. Br. 12-13. Petitioners' unauthorized release of respondent's false and defamatory education record information, in violation of the parental consent requirement, precluded respondent from pursuing the teaching career to which he had devoted his training and education. FERPA generally reflects the fact that the privacy of education records is central to a student's ability to participate meaningfully in and benefit from an education. Without assurances of privacy, students and their families may well not provide educational institutions with certain information that is critical to the pedagogical enterprise, including, for example, information about medication, psychological issues, family and financial problems, that teachers or institutions need to know in order to adapt education programs to the needs of their particular students. In any event, the antidiscrimination statutes, Title VI and Title IX, apply to any recipient of federal financial assistance, regardless of whether federal funds are provided to comply with the statute's terms, yet those statutes have been found to support implication of a private cause of action—a broader ruling than one recognizing a right enforceable under Section 1983. *See* pp. 43-46, *infra*.

5. Respondent's claim for violation of his right under 20 U.S.C. § 1232g(b)(2)(A) to withhold consent and prevent the unauthorized release by petitioners of his education record information also meets the second and third prongs of the *Blessing* standard. *See* U.S. Br. 9 n.4 (agreeing that the second and third prongs are satisfied here). The right granted parents under Section 1232g(b) is not "so 'vague and amorphous' that its enforcement would strain judicial competence." *Blessing*, 520 U.S. at 340-341. Congress crafted the provision regarding parental consent in a particularly clear fashion. Moreover, whether an educational institution has a policy or practice of releasing personally identifiable information from education records, and whether it released such information without prior written parental consent, are determinations that are readily susceptible to judicial review. *See e.g., International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977) (proof of pattern and practice in complex area of employment discrimination).

Petitioners are mistaken in suggesting (Br. 24, 33) that FERPA imposes on educational institutions a duty of only substantial compliance akin to the "substantial compliance" standard in one of the statutory provisions at issue in *Blessing*, which quantified the level of compliance for various requirements in percentage terms. *See* 520 U.S. at 335. No "substantial" language is found in the FERPA provision they cite. 20 U.S.C. § 1232g(f) (*see* Pet. Br. 33). That provision states that "the Secretary shall take appropriate actions to enforce this section and to deal with violations of the section, in accordance with this chapter." Section 1232g(f) further specifies that termination of assistance "may be taken only if the Secretary finds there has been a failure to comply with this section and he has determined that compliance cannot be secured by voluntary means." Nothing in that section suggests the Secretary's finding of "failure to comply" is limited by a "substantial compliance" standard. Nor is there a suggestion that Congress intended to preclude the Secretary

from taking "appropriate actions to enforce" FERPA absent a substantial compliance standard. Moreover, the neighboring FERPA provision that authorizes the Secretary to designate an office and review board, specifies that they are "for the purpose of investigating, processing, reviewing, and adjudicating violations" of FERPA. 20 U.S.C. § 1232g(g). There is nothing in the statute that limits FERPA violations to some unspecified "substantial [non]compliance" standard, as petitioners imply.

Petitioner's reference to "substantial compliance" relies not on FERPA, but on 20 U.S.C. § 1234c(a), which is part of the General Education Provisions Act (GEPA), 20 U.S.C. § 1221 *et seq*. (Chapter 31 of Title 20), and is referenced in 20 U.S.C. § 1232g(f). Part D of GEPA is an omnibus part, directing the Secretary to establish an office of administrative law judges to conduct hearings, and sets forth procedures for certain actions by the Secretary against fund recipients, including the recovery of funds, withholding of payments, compelling compliance through cease and desist orders, and entering into formal compliance agreements. 20 U.S.C. §§ 1234(a), 1234a-1234g. It provides that the Secretary may take such actions against recipients "[w]henever the Secretary has reason to believe that any recipient of funds under any applicable program is failing to comply substantially with any requirement of law applicable to such funds." 20 U.S.C. § 1234c(a).

Section 1234c(a) does not, however, apply to the FERPA enforcement scheme established by the Secretary, which is administered by the Family Policy Compliance Office (FPCO). Section 1234c(a) applies only after FPCO has found that an educational institution has not complied with FERPA, and the institution has failed to comply with FPCO's directive of the specific steps the institution must take to come into compliance. 34 C.F.R. §§ 99.66(c), 99.67(a) (providing that, if recipient fails to comply within time period set by FPCO, the Secretary may, "in accordance with part E [sic]" of

GEPA, withhold payments, issue a complaint to compel compliance, or terminate eligibility to receive funding). *See also* Pub. L. No. 103-382 § 212(a)(2), (b)(2), 108 Stat. 3913 (1994) (redesignating Part E of GEPA as Part D). According to the United States, "the Secretary has not found it necessary to resort to more formal enforcement measures," and has relied exclusively on the FPCO scheme, except in one instance. U.S. Br. 26 n. 15.

Section 1232g(b) also "unambiguously impose[s] a binding obligation" on recipients of federal educational program funds, as required under the third and final prong of *Blessing*, 520 U.S. at 341. Section 1232g(b)(2) uses the term "unless" which is mandatory. *See id.* at 341 (citing *Wilder*, 496 U.S. at 510-511). Congress unequivocally imposed a duty on an educational institution that has a policy or practice of releasing education record information to persons other than those authorized in Section 1232g(b)(1), to obtain written parental consent, in accordance with the requirements of Section 1232g(b)(2)(A), before releasing such information. Petitioners' contrary interpretation of FERPA, in effect, erases the individual parental consent requirement, Section 1232g(b)(2)(A), from the statute, and reads Section 1232g(b) as if it contained no paragraph (2).

B. FERPA's Statutory Structure Confirms That Section 1232g(b)(2) Creates An Enforceable Parental Right

1. The most significant structural evidence of Congress' intent with respect to Section 1232g(b) is found in the "directory information" provision of FERPA. Both paragraphs (1) and (2) of Section 1232g(b) exempt "directory information" from the restrictions on releases of education record information. 20 U.S.C. §§ 1232g(b)(1), 1232g(b)(2). "Directory information" is defined by FERPA to mean certain basic information about students, including "the student's name, address, telephone listing, date and place of birth,

major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student." 20 U.S.C. § 1232g(a)(5)(A). Directory information is information "that would not generally be considered harmful or an invasion of privacy if disclosed." 34 C.F.R. § 99.3. Congress provided that any educational institution that makes directory information public "shall give public notice of the categories of information which it has designated as such information with respect to each student * * * and shall allow a reasonable period of time after such notice has been given for a parent to inform the institution or agency that any or all of the information designated should not be released without the parent's prior consent." 20 U.S.C. § 1232g(a)(5)(B).

Congress thereby provided parents, through the directory information notice requirement, the ability to control release of education record information at a general level when the information is not of a particularly private nature. When the information to be released is more private, however, and may be considered harmful or an invasion of privacy if disclosed, Congress afforded parents, through the written parental consent requirement of Section 1232g(b)(2)(A), a correspondingly more specific right of control. That right includes being informed of the particular record information that is intended to be released, the reason for the release, and the intended recipient, and being afforded the right to withhold consent and prevent the release of that particular record information.

2. Comparison of the parental consent requirement of Section 1232g(b)(2)(A) with other release provisions in FERPA also confirms that Congress intended in that section to create an individual parental right to withhold consent and prevent the unauthorized release of education records. When

Congress specified in Section 1232g(b)(1) the numerous releases of education record information that do not require parental consent, it placed certain conditions that address parental privacy interest on several categories. See 20 U.S.C. § 1232g(b)(1)(B), (C), (E), (F), (J). Those conditions vary, but all fall short of creating an individualized parental right to prevent release of education record information by withholding consent. In each instance, the education record information may be released over the objection of the parent. For example, under Section 1232g(b)(1)(B), when an educational institution plans on releasing a student's education records to another school that the child plans to attend, the educational institution must provide parents with notice of the release, a copy of the records, and "an opportunity for a hearing to challenge the content of the record." 20 U.S.C. § 1232g(b)(1)(B). Congress did not require that the school get consent from the parents and, therefore, parents do not have an ultimate right to prevent such a release. The different approaches Congress chose to take with regard to various recipients who are authorized to receive education records without parental consent make clear that Congress knew how to impose a less individualized condition when it deemed that appropriate.

3. Congress' intent to create an individual parental right to withhold consent and prevent release of education record information is also consistent with Section 1232i of Title 20. In that section, entitled "[l]imitations on withholding of Federal assistance," Congress ensured that an educational institution's federal funding would not be imperiled because of its honoring a parent's right to prevent release of education record information under Section 1232g(b)(2)(A). Section 1232i(a) provides, in relevant part, that "[e]xcept as provided in section 1232g(b)(1)(D) of this Title" (regarding student financial aid), the refusal of an educational institution "to provide personally identifiable data on students or their families, as part of any applicable program, to any Federal

office, agency, department, or other third party, on the grounds that it constitutes a violation of the right to privacy and confidentiality of students or their parents, shall not constitute sufficient grounds for the suspension or termination of Federal assistance," or imperil funding in subsequent years. 20 U.S.C. § 1232i(a). Congress thereby reaffirmed the significance of the right of parents to maintain the privacy of their children's education records and the importance of the obligation of an educational institution to honor that right. *Cf.* 20 U.S.C. § 2304 (providing that nothing in the chapter on vocational and technical education "shall be construed to supersede the privacy protections afforded parents and students under section 1232g"); 20 U.S.C. § 9274 (same regarding Workforce Investment Act of 1998).

4. Petitioners purport to analyze "the statutory provisions in detail, in light of the entire legislative enactment," (Pet. Br. 12 (quoting *Suter*, 503 U.S. at 357); *see also id.* at 22), but they do not examine the overall statutory structure. Their analysis amounts only to contending that, because Congress used the term "rights" in subsection (a) of Section 1232g with respect to parents' access to education records, Congress' failure to use that term in subsection (b) in connection with the parental consent requirement means that Congress did not intend to create any individual rights there. *Id.* at 22-23. Consistent with their treatment of FERPA as an undifferentiated whole, however, petitioners also note that they believe that even subsection (a)'s use of the term "rights" of inspection and review does not create any right enforceable under Section 1983. *Id.*at. 23 n.5. Thus, little weight can be given to their argument that the absence of the term "rights" in subsection (b) is significant.

In any event, it would be error to infer that Congress did not intend to create an individual right in Section 1232g(b)(2)(A) based on the absence of the term "rights" in that provision. To the extent the term "right" in subsection (a)

creates an individualized right of parents to inspect and review their child's education records (20 U.S.C. § 1232g(a)(1)(A), (B)), that interpretation would indicate that Congress also intended to create, in subsection (b), a parental right to withhold consent for unauthorized release of education record information.[4] An inspection and review right likely would be exercised by parents when an event, such as notification that the educational institution intends to release education record information to a third party, prompts concern about the accuracy or scope of their child's education records. Before granting such consent, parents may want to inspect and review their child's education records to ensure accuracy and determine whether they should seek to correct the records or insert an explanation under 20 U.S.C. § 1232g(a)(2). If there were no individualized right to enforce the parental consent requirement under Section 1232g(b)(2)(A), however, the parents' rights of inspection and review in such a situation would be meaningless. Release of the records could take place without notice to parents and would not allow the parents to exercise that right in a timely manner.[5]

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[4] Whether subsection (a) creates enforceable parental rights of access and review depends on a particularized analysis of that statutory provision and the particular right alleged, consistent with this Court's admonition in *Blessing*. For example, that analysis may differ to the extent that FERPA's administrative scheme could remedy the violation by a directive to the educational institution to provide such access.

[5] Any adverse inference drawn from the absence of the term "right" in the parental consent requirement of Section 1232g(b)(2)(A) would also be error in light of the reference elsewhere in FERPA to the parental consent requirement according parents and students "rights." *See* 20 U.S.C. § 1232g(d) (entitled: "Students' rather than parents' permission or consent") (specifying that, for purposes of FERPA, "whenever a student has attained eighteen years of age, or is attending an institution of postsecondary education, the permission or consent required of and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student." *See also* 34 C.F.R. § 99.7(a)(2)(iii).

C. FERPA'S Legislative History Indicates That Congress Intended An Individual Parental Right To Prevent Release Of Education Record Information

1. FERPA's legislative history confirms that Congress intended to afford individual parents the right to withhold consent and prevent the release of education records. When the FERPA legislative proposals were first being brought to the attention of Congress, Representative Kemp discussed the competing interests of parents in protecting the privacy of education record information and of schools in using the information for educational purposes. He suggested an answer based on the practice at many universities that prohibited the release of student transcripts "unless the student or graduate specifically consents to the release of the transcript to a specified party." 120 Cong. Rec. 9370 (1974). He proposed that "there could be a release of information contained in these records, except for clearly defined internal purposes within an education system or systems, only when the parent or guardian of the student gave written prior consent, or once the student has reached the age of majority, he give it himself." *Ibid.*

Senator Buckley also focused on the individual rights of parents and students when he introduced FERPA, declaring the need to address the "systematic violation of privacy and personal rights, through the existence of secret files, of two of the largest classes of Americans"—school children and their parents. *Id.* at 13,951; *see also id.* at 13,952 (explaining that some educators had forgotten about parental responsibility and "think they have the right to do what they themselves think is best for the child, without regard for values and beliefs of the parents"); *id.* at 14,581 (FERPA "seeks to restore parental rights and to protect privacy"). Significantly, in explaining the comparable parental consent requirement regarding directory information (*see* pp. 22-23, *supra*), that

was added to FERPA in a retroactive amendment shortly after enactment, Senators Buckley and Pell, the proponents of the amendment, explained that it "would allow parents with unlisted telephone numbers, for example, to have the right to keep such numbers unlisted." *Id.* at 39,863; *see also* 121 Cong. Rec. 13,990-13,992 (1975) (speech by Senator Buckley explaining his reasons for introducing FERPA and citing the principle that "[t]here must be a way for an individual to prevent information about him that was obtained for one purpose from being used or made available for other purposes without his consent"); *id.* at 13,991.

The materials and articles entered into the legislative record and referenced during the debates also focused on the individual rights of parents to make decisions about and to control what education record information schools could distribute about their children. *See, e.g.*, 120 Cong. Rec. 9928-9930, 9985-9987, 10,142-10,144 (1974) (reproducing Sarah C. Carey, *Students, Parents and the School Record Prison: A Legal Strategy for Preventing Abuses, reprinted in* 3 J.L. & Educ. 365 (July 1974)) (discussing "affirmative right of decisionmaking on the part of the parent;" urging, *inter alia*, that access to student records be denied to non-school personnel absent express consent of parents or student; emphasizing underlying right of control over records necessary to parental decisionmaking and enforcement of "personal rights"); 120 Cong. Rec. 14,580 (citing National Committee for Citizens in Education, J. William Rioux & S. A. Sandow, *Children, Parents and School Records* (May 1974)) (addressing concerns about who has access to school records "without parental-student control;" categorizing laws in 50 States regarding whether there is access by noneducational agencies to education records "without parent/student control"); *see also id.* at 13,954; 17,719 (citing same).

Furthermore, the injury to respondent's academic future and career caused by the release of his education record information without his consent or opportunity to correct or explain, is precisely the type of injury that concerned Congress. *See, e.g.*, 120 Cong. Rec. 14,580 (1974) ("[w]hen parents and students are not allowed to inspect school records and make corrections, numerous erroneous and harmful material can creep into the records. Such inaccurate material can have devastatingly negative effects on the academic future and job prospects of an innocent, unaware student."); *see also, e.g., id.* at 13,953-13,954 (reproducing Diane Divoky, *How Secret School Record Can Hurt Your Child*, Parade Magazine (Mar. 31, 1974)) (discussing various education records that included assessments of very young children's sexual tendencies based on unremarkable conduct, and one that described a child as a bed-wetter and her mother as an alcoholic "with a different boyfriend in the house each night").

2. Petitioners argue that the legislative history contains no indication of a congressional intent to allow private damages actions. Pet. Br. 29-31, 35. But the question is not whether Congress expressed an intent to create a damages action. Rather, the question is whether Congress expressed an intent to foreclose the otherwise presumptively available Section 1983 action to remedy violation of individual federal rights created under FERPA. Congress did not so indicate.

In any event, petitioners provide an incomplete picture of the legislative history. There are several references in the legislative record to court actions against educational institutions involving student privacy and education records, without any criticism of such actions or any other indication that Congress intended to prohibit a Section 1983 action to enforce a federal right under FERPA. *See, e.g.*, 120 Cong. Rec. 9635 (1974) (discussing *Doe* v. *MacMillan*, 412 U.S. 306 (1973) (Section 1983 action for damages and injunctive

relief brought by parents against school and other officials alleging that collection and publication of evaluations and test scores with students' names violated children's rights to privacy)); 120 Cong. Rec. 14,581 (1974) (discussing *Merriken* v. *Cressman*, 364 F. Supp. 913 (E.D. Pa. 1973) (parents sought injunction against school's requiring child's participation in a survey about drug use)). *See also* 120 Cong. Rec. 39,863 (1974) (Joint Statement by Senators Buckley and Pell supporting amendment) ("[o]f course, the provisions of the amendment do not affect whatever rights a student or his parents might have in civil proceedings, as in the case where confidentially-received material causes the student or his parents actionable damage"); *id.* at 36,530 (article discussing court actions to have school records opened to parents and to have records not released to others, and describing successful suit for damages against school official releasing information about students' disciplinary violations). *See also* 20 U.S.C. § 1232g(j)(3) (as added by the Act of October 26, 2001 (USA PATRIOT Act), Pub. L. No. 107-56, § 507, 115 Stat. 272, 367-368 (2001) (providing that an educational institution "shall not be liable" to a person for production of education records that were produced in good faith in accordance with an *ex parte* court order authorized by the statute).

3. Petitioners also assert that the legislative history does not include any indication by Congress that it intended to create a "two-track enforcement system" under FERPA that subjects public and private schools to different enforcement schemes. Pet. Br. 31-32, 35. While petitioners are correct that public and private schools may be held liable for damages under Section 1983 in different ways, that is not the result of FERPA. Rather, any difference must be attributed to the limits on the scope of Section 1983 which, for example, prohibit a suit for damages against a State or state official and allow such a suit against a local governmental entity only in limited circumstances. *See* pp. 43-45, *infra*.

Petitioners claim, as well, that there is no evidence that Congress regarded state compensatory relief as inadequate. Pet. Br. 30 n.7; 39 n.11. The legislative record of FERPA does, however, contain several references to the inadequacy of state remedies. *See, e.g.*, 120 Cong. Rec. 9930 (1974) (article noting that "[m]ost states leave both the scope of school files and the terms of access to the discretion of state and/or local school authorities"); *id.* at 9985-9986 (article noting that, even where there are favorable state laws, "[a]ctual practice * * * tends to favor access by public officials, while disfavoring the parent"); *id.* at 14,580 (citing article that categorizes laws in 50 States to demonstrate the inconsistencies and inadequacies of state law protections, including column indicating that some States protect school personnel "from legal redress" for use of the contents of education records); *see also* 120 Cong. Rec. 9634-9635; 13,951-13,953 (1974).

II. FERPA's ADMINISTRATIVE SCHEME IS NOT SUFFICIENTLY COMPREHENSIVE TO SUPPLANT RESPONDENT'S SECTION 1983 SUIT

This Court reaffirmed in *Blessing* that, when its three-factor analysis concludes that a federal statutory provision creates an individual right, as is the case here, that right is presumptively enforceable under Section 1983. 520 U.S. at 341. Enforcement of such a right under Section 1983 can be barred only if Congress expressly forecloses a remedy by "forbidding recourse to § 1983 in the statute itself," or "impliedly by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Ibid.* (citing *Livadas* v. *Bradshaw*, 512 U.S. 107, 133 (1994)). Petitioners do not claim that any provision of FERPA expressly precludes respondent's Section 1983 suit. Respondent's Section 1983 action may, therefore, be proscribed only if petitioners "make the difficult showing that allowing a § 1983 action to go forward in these

circumstances 'would be inconsistent with Congress' carefully tailored scheme.'" *Blessing*, 520 U.S. at 346 (quoting *Golden State Transit Corp.* v. *Los Angeles*, 493 U.S. 103, 107 (1989) (citation and internal quotation marks omitted in *Blessing*)). Petitioners have failed to make such a showing.

A. FERPA's Administrative Scheme Does Not Provide Redress For An Individual Claim

This Court has found "a remedial scheme sufficiently comprehensive to supplant § 1983" on only two occasions. *Blessing*, 520 U.S. at 347 (citing *Middlesex County Sewerage Authority* v. *National Sea Clammers Assn.*, 453 U.S. 120 (1981), and *Smith* v. *Robinson*, 468 U.S. 992 (1984)). Most significantly, and as this Court emphasized in *Blessing*, the remedial schemes at issue in both those instances afforded private persons other avenues for obtaining relief. *See Blessing*, 520 U.S. at 347 (underscoring that the statutes at issue in *Sea Clammers*, 453 U.S. at 13, had "unusually elaborate enforcement provisions," including "two citizen-suit provisions"); *Blessing*, 520 U.S. at 347 (emphasizing that statute at issue in *Smith* v. *Robinson*, 460 U.S. at 1009, allowed "aggrieved individuals to invoke 'carefully tailored' local administrative procedures followed by federal judicial review").

The argument by petitioners (Br. 23-29, 34-39) and their *amici* (*e.g.*, U.S. Br. 23-30) that FERPA's administrative scheme is sufficiently comprehensive to preclude respondent's Section 1983 suit, cannot be reconciled with the limited rights in fact accorded parents or adult students under that scheme. FERPA's administrative scheme affords an individual no meaningful redress in any tribunal for the violation of rights under 20 U.S.C. § 1232g(b)(2)(A).

1. FERPA's regulations allow parents to mail a written complaint regarding an alleged violation of FERPA to the Family Policy Compliance Office (FPCO) of the Department

of Education. 34 C.F.R. § 99.63. FPCO determines whether the complaint is timely and whether the allegations give "reasonable cause" to believe that a violation of the Act or regulation has occurred. *See* 34 C.F.R. § 99.64(a). If FPCO believes that the complaint does not meet that standard, FPCO notifies the parents that it is not investigating the claim. 34 C.F.R. § 99.65(b). There is no adjudication of whether the legal standard for investigation was met. Parents are neither afforded a right to challenge FPCO's rejection of their complaint nor any right to appeal such a rejection.

If FPCO finds that a parent's complaint meets its standard for investigation, FPCO will investigate. 34 C.F.R. § 99.64(b). Once FPCO initiates an investigation, it notifies the complainant and the educational institution and asks the institution for a written response. 34 C.F.R. § 99.65(a). FPCO "may permit" submission of further arguments or information. 34 C.F.R. § 99.66(a). Parents do not, however, have a right to reply to the educational institution's response. Indeed, it appears that parents do not have the right to see the response from the educational agency. There is no provision for any hearing on a parent complaint or any opportunity for parents to request one.

After FPCO completes its investigation, it provides the complainant and the educational institution written notice of its findings and the basis for them. 34 C.F.R. § 99.66(b). Upon a finding of noncompliance with the statute, FPCO specifies the steps that the institution must take to comply within a reasonable period of time. 34 C.F.R. § 99.66(c). If FPCO finds that the institution has complied voluntarily with the statute, FPCO provides the complainant and the institution written notice of that decision and the basis for the decision. 34 C.F.R. § 99.67(b). Again, parents are not afforded any right to challenge FPCO's findings nor to seek review of them. There is no provision whatsoever for individual relief or for redress of an individual's injury caused by violation of a right under FERPA.

If the educational institution does not comply with FPCO's directive of the steps necessary to come into compliance, the Secretary may take action against the recipient under part D of GEPA, 20 U.S.C. § 1234 *et seq.* *See* 34 C.F.R. § 99.67(a); pp. 21-22 *supra*. The GEPA procedures address only the rights of fund recipients, not individual complainants. GEPA provides for hearings in the Office of the Administrative Law Judge, review by the Secretary, and ultimately a right to judicial review in the court of appeals for a fund recipient adversely affected by certain final agency actions. 20 U.S.C. § 1234g. The GEPA enforcement provisions do not afford any relief to parents or other individual complainants whose rights have been violated. Parents are not parties to the administrative proceeding. 34 C.F.R. § 81.2 (only "[a] recipient that appeals a decision" and the "authorized Departmental official who issues a decision that is appealed" are parties). Parents have no right to appear in the ALJ proceedings, or to appeal from the decision. An ALJ may allow their participation only as a non-party and as a matter of discretion. 34 C.F.R. § 81.7. A provision authorizing the Secretary to enter into formal compliance agreements specifies that affected parents and students are invited to participate in that hearing, 20 U.S.C. § 1234f(b), but that provision also explicitly states that the purpose of a compliance agreement is "to bring the recipient into full compliance with the applicable requirements of law as soon as feasible and not to excuse or remedy past violations of such requirements." 20 U.S.C. § 1234f(a).

The fact that FERPA's administrative scheme does not afford redress to individual parents is consistent with the statutory scheme. Petitioners and their *amici* point to Congress' grant of authority to the Secretary to establish an office and review board "for the purpose of investigating, processing, reviewing and adjudicating violations of this section and complaints which may be filed concerning alleged violations," of FERPA. 20 U.S.C. § 1232g(g). They

emphasize, in particular, the statute's references to "adjudicating" "complaints," and read that as authorizing agency adjudication of "individual complaints." *See* Pet. Br. 3, 10, 11, 25, 34, 36; U.S. Br. 5, 25. As demonstrated above, however, FPCO does not adjudicate complaints. Moreover, it is not designated by regulation to do so. The Secretary has designated FPCO only to "[i]nvestigate, process, and review complaints and violations" under the statute and regulations and to "[p]rovide technical assistance to ensure compliance" with the statute and regulations. 34 C.F.R. § 99.60(b)(1), (b)(2).[6]

The only adjudication of a "complaint" that is afforded under the FERPA administrative scheme is the adjudication of complaints that are issued by the Secretary under the GEPA enforcement provisions, 20 U.S.C. § 1234e(a), seeking a cease and desist order against a recipient. That appears to be the type of complaint to which Section 1232g(g) refers. See 20 U.S.C. § 1232g(f) (specifying that the Secretary shall take appropriate enforcement actions and deal with violations of the statute "in accordance with this chapter," referring to GEPA, which contains the administrative hearing procedures for fund recipients); see also 34 C.F.R. § 99.67(a)(2) (providing that, if FPCO review does not result in compliance by the educational institution, "the Secretary may," in accordance with part D of GEPA, "[i]ssue a compl[ai]nt to compel compliance through a cease-and-desist order"); *but*

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[6] Consistent with FPCO's limited investigation process, the regulations were amended in 1987 to eliminate FPCO's authority to require an educational institution to "afford access" to education records. The regulation was changed to authorize FPCO to require an educational institution to "submit reports," because that "more accurately reflect[s] the kind of investigation conducted by" FPCO. 52 Fed. Reg. 22, 252 (1987). At that time, the Secretary explained that, "[s]ince its inception, [FPCO] has not conducted any on-site visits to resolve complaints; rather it has resolved complaints through correspondence and telephone calls with the affected parties." *Ibid.*

see 34 C.F.R. §§ 99.63 -99.66 (also referring to "complaint" filed by parents or eligible student).

2. FERPA's "administrative enforcement arsenal [does] not compare to those in *Sea Clammers* and *Smith* [v. *Robinson*]." *Blessing*, 520 U.S. at 348. It is far more limited than the scheme at issue in either of those cases. Unlike the statutes at issue in *Sea Clammers*, 453 U.S. at 13-14, individuals do not have a right to sue to compel compliance nor does FPCO have the authority to seek criminal penalties. Unlike the statute in *Smith*, 468 U.S. at 1009, individuals do not have a right to administrative procedures followed by judicial review. The FERPA scheme also affords less individualized consideration than the schemes at issue in *Wright* and *Wilder*. It provides respondent neither a right or an opportunity for a hearing, nor any right to an administrative appeal. Thus, FERPA contains "no private remedy—either judicial or administrative" through which a person aggrieved by a violation of the parental consent requirement in Section 1232g(b)(2)(A) "can seek redress," and it is insufficient to supplant a Section 1983 action. *Blessing*, 520 U.S. at 348. The mere existence of FERPA's generalized administrative scheme cannot defeat respondent's ability to invoke section 1983. *Id.* at 347 (citing *Golden State*, 493 U.S. at 106).[7]

[7] The United States asserts that the agency's enforcement authority here should be regarded as exclusive based on an isolated characterization of the compliance mechanism created by the Act as being the "only means of enforcement" available. *See* U.S. Br. 27 n.16 (quoting 120 Cong. Rec. 36,534 (1974)). That characterization of the statutory scheme is contained in a prepared question that is quoted in the legislative history. The answer, however, characterizes the scheme quite differently. It explains that FERPA had been intended to include an express private right of action, by reference to another provision of the general education bill, but that that express right provision was no longer in that part of the law. 120 Cong. Rec. 36,534. Thus, the answer confirms that Congress did not view private enforcement under FERPA as inconsistent with the statutory scheme, although the intended provision for an express right to do so was eliminated by virtue of rejection of that provision in the other part of the legislation.

B. A Section 1983 Action Is Not Incompatible With FERPA's Administrative Scheme

Petitioners contend that enforcement of respondent's right under Section 1983 to withhold consent and prevent release of his education record information would be incompatible with administrative enforcement of FERPA. They claim that Section 1983 actions would be duplicative, would result in inconsistent judicial interpretations of the statute, that would run contrary to the centralized administrative enforcement intended by Congress, and would allow a damages remedy that would frustrate the statutory provision that affords an educational institution the opportunity to comply voluntarily before federal funding can be withheld. *See* Pet. Br. 24-29, 34-35, 35-39; *see also* U.S. Br. 23-30. A private action, like respondent's, that seeks redress for an injury that is not redressable through the administrative scheme, however, complements, rather than frustrates, that scheme.

1. A Section 1983 action to redress an injury caused by an educational institution's violation of FERPA's parental consent requirement, 20 U.S.C. § 1232g(b)(2)(A), is not duplicative of the administrative scheme. As demonstrated above, that scheme does not allow for adjudication of an individual claim and does not afford any redress for individual injury.

State law remedies also do not render duplicative a cause of action under Section 1983 to enforce the parental consent requirement under FERPA. First, as petitioners acknowledge, the existence of state law remedies is not a basis for supplanting respondent's cause of action under Section 1983. Pet. Br. 39 n.11 (citing *Wright*, 479 U.S. at 429). *See also Wilder*, 496 U.S. at 523 (citing *Patsy* v. *Board of Regents of*

Florida, 457 U.S. 496, 516 (1982)). Moreover, petitioners are incorrect about the availability of state law to redress the injury caused by a typical Section 1232g(b)(2)(A) violation. A violation of the parental consent requirement may not involve especially intimate information, albeit personal information that parents may not want disclosed. Cases that involve release of information that is truthful and of a less personal nature than that in this case may not support claims of defamation or invasion of privacy under state law. Finally, petitioners err in contending that "there is no evidence that Congress regarded compensatory relief as inadequate." Pet. Br. 39 n.11. As set forth above, the legislative record does contain such evidence. *See* p. 31, *supra*.

2. Availability of a Section 1983 action for violation of parental rights under Section 1232g(b)(2)(A) does not undermine the centralization of administrative enforcement. Judicial interpretation of FERPA is already part of the administrative scheme. Pet. Br. 20, 24; *see* U.S. Br. 28-29. Congress expressly provided for judicial review of the Secretary's enforcement actions against educational institutions. *See* 20 U.S.C. § 1234g. In addition, petitioners acknowledge that the United States can initiate actions to enforce FERPA. Pet. Br. 24 (citing *United States* v. *Miami Univ.*, *supra*). In any event, federal court review of an agency's interpretation of a federal statute does not undermine the agency's interpretation, but rather ensures that it is consistent with law. *See* 120 Cong. Rec. 36,532 (1974) (document introduced at request of Sen. Buckley) (noting that there will be questions about implementation of FERPA that may be resolved by regulation or administrative procedures, but emphasizing that "[t]hat is one of the reasons we have courts, where considerations of the intent of legislation, the test of reasonableness and of equity usually combine to produce proper and appropriate applications of the law"). Furthermore, numerous lower courts, including several federal courts of appeals, have held that a Section 1983 cause

of action is available to redress violations of FERPA. *See, e.g., Tarka* v. *Franklin*, 891 F.2d 102, 106 (5th Cir. 1989), *cert. denied* 494 U.S. 1080 (1990); *Fay* v. *S. Colonie Cent. Sch. Dist.*, 802 F.2d 21, 33 (2d Cir. 1986); Pet. App. 21a (citing cases). Petitioners cite no evidence that those rulings have led to problems in FERPA's administrative enforcement.

3. The damages remedy available in a Section 1983 action is not inconsistent with FERPA's administrative enforcement which affords an educational institution the opportunity to comply voluntarily before federal funds can be withheld. *See* Pet. Br. 24-25; U.S. Br. 29-30. The Court rejected such a view in the line of cases upholding the availability of damages in an implied cause of action under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* *Franklin* v. *Gwinnett County Pub. Schs.*, 503 U.S. 60 (1992); *Gebser* v. *Lago Vista Ind. Sch. Dist.*, 524 U.S. 274 (1998); *Davis* v. *Monroe County Bd. of Educ.*, 526 U.S. 629 (1999). Like FERPA, Title IX requires that an educational institution be afforded the opportunity to comply voluntarily before federal funds can be withheld. *See* 20 U.S.C. § 1682(2). In *Gebser*, that statutory requirement informed the standard that the Court established for recovery of damages under Title IX. 524 U.S. at 291-292. The Court held that, in a case that did not involve an official policy of the recipient, a plaintiff may recover damages under Title IX only if he establishes that an appropriate person at the educational institution had actual knowledge of the alleged discrimination and responded with deliberate indifference. *Id.* at 291.

The Court's decision in *Monell* already imposes comparable conditions in a Section 1983 action. *See* p. 44, *infra*. Moreover, as demonstrated above, Congress placed an additional limitation on liability here by applying the parental consent requirement only when an educational institution has a policy or practice of releasing such information. In addition, the standard for punitive damages (which are not

available at all against local governmental agencies) is even higher. *See* p. 45, *infra*. Therefore, the availability of a damages remedy under FERPA, as under Title IX, is not inconsistent with the statutory provision requiring an opportunity for voluntary compliance before federal fund withholding is allowed.

III. PETITIONERS' CHALLENGE TO THE *BLESSING* STANDARD IS WITHOUT MERIT

Despite the recent, unanimous, opinion of the Court in *Blessing*, petitioners assert on several occasions (Pet. Br. 3, 9, 12-20) that a more "rigorous" standard applies to this case. Although petitioners at times appear to acknowledge that *Blessing* controls here (*see id.* at 14, 32), they nonetheless also argue that, because FERPA was enacted pursuant to Congress' authority under the Spending Clause, U.S. Const. Art. I, § 8, Cl. 1, a Section 1983 action will not lie unless Congress has manifested "an unambiguous intent" to create protected individual interests enforceable under Section 1983. Pet. Br. 12, 13, 14, 17 (citing *Suter*, 503 U.S. at 357, 363).

The fact that FERPA is Spending Clause legislation does not differentiate it from the statutes before the Court in *Blessing*, *Suter*, *Wright*, or *Wilder*, all of which involved statutes enacted pursuant to Congress' Spending Clause authority. Petitioners' attempt to portray the Court's pre-*Blessing* decision in *Suter* as requiring a showing of "unambiguous" congressional intent to create an enforceable right is without merit. The United States disagrees with petitioners' proffered standard (U.S. Br. 7-9) and makes clear that, "[r]ead in context, *Suter*'s references to unambiguity were simply a particularized application of *Pennhurst* [*State Sch. Hosp.* v. *Halderman*, 451 U.S. 1 (1981)], which requires Congress to make clear that it intends to impose binding conditions on the receipt of federal funds." U.S. Br. 8. It is

also evident from the Court's reliance on *Suter* in *Blessing* that the Court did not intend for *Suter* to go beyond the *Wilder* test. *Blessing*, 520 U.S. at 342-343.

Moreover, petitioners are wrong that, in order to recognize a federal statutory right enforceable under Section 1983, a court must find that Congress unambiguously included in the substantive statute a notice that there is a private cause of action available under Section 1983 to enforce the right. *See* Pet. Br. 12. A federal right is presumptively enforceable under Section 1983. *See, e.g., Wright*, 479 U.S. at 423-424. The Court already has explained that the requirement in *Pennhurst* that Congress act "unambiguously," applies to imposition of conditions on funding, not to "the remedies available" against a noncomplying recipient. *Bell* v. *New Jersey*, 461 U.S. 773, 790 n.17 (1983).

That is so because Congress has already provided the requisite notice in the text of Section 1983. Accordingly, the Court has held on several occasions (*e.g., Wilder, Golden State, Thiboutot*) that various statutory provisions create federal rights redressable under Section 1983, without mention of any unambiguous notice in the substantive statute to recipients that they are subject to suit if they violate the prohibition of Section 1983. *See also* U.S. Br. 7-9.

A. A Section 1983 Action Does Not Raise The Same Concerns As Does An Implied Cause Of Action

1. Without explaining why *Blessing* does not settle the matter, petitioners argue for a more rigorous standard based on principles of "federalism, separation of powers, and administrative deference." Pet. Br. 9; *see also id.* at 18-20. Petitioners assert that their rigorous standard for finding "§ 1983 rights" reflects those principles, and that those principles are "implicated by a judicial decision to find such a cause of action when Congress has not legislated one expressly," but has provided an administrative scheme. *Id.* at 9.

Petitioners do not identify any violation of federalism principles here. They refer to a discussion of the Spending Clause power and States' receipt of federal funds, but do not proffer any explanation of the consequences for that interest in this case. *See* Pet. Br. 18. There is no concern about subjecting States to suit here, because it has already been established that a State (or state official) cannot be sued for damages under Section 1983 in state or federal court, absent a waiver of immunity or consent. *See, e.g., Will* v. *Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989). Moreover, the instant case does not involve any particular federalism interest because it involves a private university and its officials acting under color of state law, not a public institution or public officials.

Petitioners' purported separation of powers concerns (Pet. Br. 18-19) arise out of their misunderstanding of the differences between enforcement of a federal right under Section 1983 and the creation of an implied cause of action under a federal statute. Petitioners cite cases addressing whether courts should infer a cause of action where Congress has not expressly provided one. Pet. Br. 18-19 (citing *Alexander* v. *Sandoval*, 532 U.S. 275, 286, 287 (2001); *Cannon*, 441 U.S. at 743 (Powell, J., dissenting)); *see also* Pet. Br. 13 (citing *Gebser*, 524 U.S. at 287). In cases involving implied causes of action such as those, the Court's analysis "reflects a concern, grounded in separation of powers, that Congress rather than the courts controls the availability of remedies for violations of statutes." *Wilder*, 496 U.S. at 509 n.9. That concern does not arise here because this case involves an express cause of action under 42 U.S.C. § 1983—a private remedy already created by Congress. *Ibid.*

Petitioners' "administrative deference" argument (Pet. Br. 19-20) repeats their argument made elsewhere that a Section 1983 action is incompatible with FERPA's administrative scheme (*see id.* at. 23-29, 35-39). That argument is without merit for the reasons set forth above. See pp. 37-39, *supra*.

2. Petitioners' repeated reliance on cases involving implied causes of action also erroneously suggests that recognition of a right enforceable under Section 1983 has the same consequences as does a court's creation of an implied cause of action. *See also* U.S. Br. 10-13, 29 n.18 (citing *Sandoval, Cannon,* Title VI, and Title IX). When a court recognizes an implied cause of action, that cause of action and the remedies available thereunder, are, by definition, indeterminate in scope because the statute does not expressly address or limit them. *See e.g., Gebser*, 524 U.S. at 284-285. Petitioners' arguments suggest that a Section 1983 right would afford just as broad a remedy and that Congress should be viewed as just as unlikely to have taken such a step without expressly, or unambiguously, so stating.

Although there is a similarity between the Section 1983 inquiry and the first prong of the implied-cause-of-action analysis (*see Cort* v. *Ash*, 422 U.S. 66-75 (1975); *see* U.S. Br. 10, n.5), there are significant differences in the scope of a Section 1983 suit and an implied cause of action. *See Wilder*, 496 U.S. at 509 n.9. The cause of action for deprivation of a federal right under Section 1983 is limited by the express statutory text, as well as by its historical background. An implied cause of action, such as those under Title VI or Title IX, does not share that text or history.

First, as noted above, a State (as well as a State official acting in his official capacity) is not subject to suit for damages under Section 1983 in either state or federal court, absent consent or waiver. *Will*, 491 U.S. at 71. A state institution of higher education that is an arm of the State, as the overwhelming majority of state universities appear to be, is entitled to such immunities as well. *See, e.g., Regents of the University of California* v. *Doe*, 519 U.S. 425 (1997). Even in the few instances where a state university is not an arm of the State (a matter determined by reference to state law), no damages are available against it in any event if the money would come from State coffers. *Edelman* v. *Jordan*,

415 U.S. 651, 663 (1974). In fact, Section 1983 actions against state officials will lie only for prospective injunctive relief. *Ex Parte Young*, 209 U.S. 123 (1908).

Second, Congress made Section 1983 actions available only against persons that act "under color of" a state "statute, ordinance, regulation, custom, or usage." 42 U.S.C. § 1983. Thus, a private school and its officials generally cannot be sued under Section 1983. *See, e.g., Rendell-Baker* v. *Kohn*, 457 U.S. 830 (1982); *Richardson* v. *McKnight*, 521 U.S. 399, 412 (1997). It is only the exceptional case like respondent's, where a private school, or school official, acts under color of state law, that such an action can be brought.

Third, the circumstances are limited in which a Section 1983 action is available against local public entities, such as school boards. If a school district is an arm of the state, it is entitled to the same immunity as the State. *See Freeman* v. *Oakland Unified Sch. Dist.*, 179 F.3d 846 (9th Cir. 1999) (holding that a California school district is an arm of the State for purposes of the Eleventh Amendment). If a local school district is not an arm of the state, *see Mt. Healthy City School Dist. Bd. Educ.* v. *Doyle*, 429 U.S. 274, 280-281 (1977), it can be sued under Section 1983, but only when the alleged misconduct: "implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by the body's officers;" is the action of a person with final decisionmaking authority for the entity; is caused by a policy of inadequate training or supervision (which requires proof of deliberate indifference); or is pursuant to a policy or custom of the entity. *Monell*, 436 U.S. at 690-695; *Pembaur* v. *City of Cincinnati*, 475 U.S. 469, 479-484 (1986); *City of Canton* v. *Harris*, 489 U.S. 378, 389-390 (1989). A Section 1983 action against a local public entity is limited because a public entity cannot be held liable under Section 1983 for actions of its employees under a respondeat superior theory. *Monell*, 436 U.S. at 691.

Section 1983 suits against individual public officials are limited as well because such officials are entitled to absolute immunity in certain instances, as petitioners elsewhere acknowledge, including when they perform legislative and judicial functions. *See* Pet. Br. 41 n.13. Public officials are also insulated from Section 1983 liability by the doctrine of qualified immunity. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982); *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986) (qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law").

Finally, punitive damages are not available in an action under Section 1983 against a local public entity. *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981). The punitive damages that are available against individuals under Section 1983 are an unusual occurrence because there is an extremely exacting standard that must be met to support such an award. *Smith* v. *Wade*, 461 U.S. 30, 56 (1983) (punitive damages available in Section 1983 action only where the official's conduct is "shown to be motivated by evil motive or intent or when it involves reckless or callous indifference to the federally protected rights of others"). Again, this case is one of the extraordinary cases in which the petitioners' actions met that standard.[8] There does not appear

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[8] There are numerous facts unique to this case that place it in the exceptional category of cases warranting punitive damages: the education record information released was based upon hearsay, involved defamatory allegations of serious criminal conduct that were never subject to scrutiny in any type of hearing, and were of the most personal nature; petitioners never informed respondent of their investigation or the purported allegations of sexual assault; the victim did not report a sexual assault, denied that such an assault occurred, informed petitioners that they misunderstood the situation, and urged them not to take action against respondent; and when respondent and his family finally learned of the accusations included in respondent's education records, they were told by petitioners that they had no right of appeal. Finally, the $300,000 award in punitive damages was a much lesser sanction than withholding of federal funds would have been, in that petitioner Gonzaga received

to be another reported case over the course of the 27 years since enactment of FERPA, where that standard was met. That is true notwithstanding the fact that several courts of appeals have held that a Section 1983 action is available under FERPA. *See* pp. 38-39, *supra*.

The implied causes of action under Title VI and Title IX are not as limited in significant respects. Congress has expressly abrogated a State's immunity from suit in federal court for legal and equitable relief under those statutes. *See* 42 U.S.C. § 2000d-7(a). Also, the implied causes of action under Title VI and Title IX are not limited by the text of Section 1983 and are, therefore, available as a basis for suit against a private entity. *See Cannon*, 441 U.S. at 680 n.1 (Title IX action against private university). Whether punitive damages are available under an implied cause of action under Title VI and Title IX is as yet undetermined by this Court, but the question whether they are available in an implied cause of action under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a) *et seq.*, is pending in *Barnes* v. *Gorman*, No. 01-682 (to be argued April 23, 2002).

The above-described limitations on suits brought under Section 1983, particularly as compared to the breadth of an implied cause of action, demonstrate that petitioners and their *amici* overstate the scope of the Section 1983 cause of action and the consequences of such actions.

B. Nineteenth Century Common Law Should Not Alter The *Blessing* Analysis

Petitioners' most sweeping argument (Br. 39-43) is that FERPA, as Spending Clause legislation, is a contract that third party beneficiaries cannot seek to enforce because such a right did not exist at the time of the enactment, in 1871, of Section 1983's predecessor statute.

"between $23 million and $30 million each year" in the "four academic years preceding the time of trial." Br. in Op. 11 n.4 (citing Exh. 54).

1. Petitioners contend that the Court should employ a different standard in determining whether Section 1983 is available to enforce a right conferred by Spending Clause legislation, as opposed to a right conferred by legislation enacted pursuant to other congressional authority. They claim that it is not "clear that the conditions in Spending Clause legislation qualify as 'laws' under § 1983." Pet. Br. 42 n.14. As petitioners' *amici* recognize, however, that argument is inconsistent with two decades of this Court's precedent holding that individuals may sue under Section 1983 to enforce rights under Spending Clause legislation. *See* Brief of States of Illinois, *et al.* 4; U.S. Br. 22-23.

Petitioners' argument also is premised on their characterization of FERPA as a "Spending Clause contract." Pet. Br. 39. The Court has described Spending Clause legislation as "much in the nature of a contract," *Pennhurst,* 451 U.S. at 17, and having "a contractual aspect." *Bennett* v. *Kentucky Dept. of Education,* 470 U.S. 656, 669 (1985). The Court also has emphasized, however, that federal grant programs "cannot be viewed in the same manner as a bilateral contract governing a discrete transaction." *Ibid.* The Court has explained that, "[u]nlike normal contractual undertakings, federal grant programs originate in and remain governed by statutory provisions expressing the judgment of Congress concerning desirable public policy." *Ibid.* Once a State agrees to participate in a program, the requirements of federal funding become mandatory and binding. *See, e.g., Wilder,* 496 U.S. at 502. The Court has repeatedly recognized that Congress may employ that power to further broad policy objectives, in pursuit of the general welfare, by conditioning the receipt of federal funds on compliance by the recipient with federal statutory directives. *See South Dakota* v. *Dole,* 483 U.S. 203, 206-208 (1987).

That distinction between a condition on receipt of federal funding and a bilateral contract with the government is particularly clear here. Section 1221 of Title 20 provides

that, except as otherwise provided, GEPA (which includes FERPA and administrative procedures for actions against noncomplying recipients of federal educational funds), "applies to each applicable program of the Department of Education." 20 U.S.C. § 1221(b)(1). That Section goes on to specify that, except as otherwise provided, GEPA "does not apply to any contract made by the Department of Education." 20 U.S.C. § 1221(b)(2). Thus, Congress does not regard the recipients of federal educational funds as mere parties to a "Spending Clause contract."

2. Even if there were a basis for applying late Nineteenth Century contract law to determine the availability here of a Section 1983 action, petitioners' description of that law is incomplete. Petitioners cite various contracts treatises (Pet. Br. at 40, n.12), to paint a historical picture that erroneously suggests a categorical prohibition against third party beneficiary suits in 1871. The United States (Br. 20-22) presents a group of treatises to the contrary. In fact, several of the treatises cited by petitioners acknowledge that the law in the 1870s was less than settled in this area and undermine the broad claim that it "generally was the law in 1871" that a third-party could not sue to enforce a contract made for his benefit. *See* 1 Francis Hilliard, *The Law of Contracts* 425-427 (1872); 1 William W. Story, *A Treatise on the Law of Contracts* 509 (M. Bigelow ed. 1874); 2 Francis Wharton, *A Commentary on the Law of Contracts* 160-161 (1882).

3. Finally, the United States proffers a forceful argument that an appropriate analogy for Spending Clause legislation at the time of Section 1983's enactment is not a traditional bilateral contract, but rather that of a trust. *See* U.S. Br. 19-20. A federal funding recipient serves, in essence, as the trustee for the persons that Congress intended to benefit by its grant of funds. It was well-settled at the time of Section 1983's enactment, as it is today, that the beneficiaries of a trust possessed standing to sue the trustee for violation of the

trustee's obligation. *See Ibid.* Under that analogy, the intended beneficiaries of a funding statute maintain standing to bring an action under Section 1983.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Supreme Court of Washington.

Respectfully submitted.

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APPENDIX

20 U.S.C. § 1221 (2000) provides, in relevant part:

§ 1221. Short title; applicability; definitions

(a) Short title

This chapter may be cited as the "General Education Provisions Act".

(b) Applicability of chapter

(1) Except as otherwise provided, this chapter applies to each applicable program of the Department of Education.

(2) Except as otherwise provided, this chapter does not apply to any contract made by the Department of Education.

(c) Definitions

As used in this chapter, the following terms have the following meanings:

(1) The term "applicable program" means any program for which the Secretary or the Department has administrative responsibility as provided by law or by delegation of authority pursuant to law. The term includes each program for which the Secretary or the Department has administrative responsibility under the Department of Education Organization Act [20 U.S.C. 3401 *et seq.*] or under Federal law effective after the effective date of that Act.

* * * *

The Family and Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. § 1232g (2000), as amended by Pub. L. No. 107-56, Title V, § 507, 115 Stat. 367 (2001), provides:

§ 1232g. Family educational and privacy rights

(a) Conditions for availability of funds to educational agencies or institutions; inspection and review of education records; specific information to be made available; procedure for access to education records; reasonableness of time for such access; hearings; written explanations by parents; definitions

(1)(A) No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children. If any material or document in the education record of a student includes information on more than one student, the parents of one of such students shall have the right to inspect and review only such part of such material or document as relates to such student or to be informed of the specific information contained in such part of such material. Each educational agency or institution shall establish appropriate procedures for the granting of a request by parents for access to the education records of their children within a reasonable period of time, but in no case more than forty-five days after the request has been made.

(B) No funds under any applicable program shall be made available to any State educational agency (whether or not that agency is an educational agency or institution under this section) that has a policy of denying, or effectively prevents, the parents of students the right to inspect and review the education records maintained by the State

educational agency on their children who are or have been in attendance at any school of an educational agency or institution that is subject to the provisions of this section.

(C) The first sentence of subparagraph (A) shall not operate to make available to students in institutions of postsecondary education the following materials:

(i) financial records of the parents of the student or any information contained therein;

(ii) confidential letters and statements of recommendation, which were placed in the education records prior to January 1, 1975, if such letters or statements are not used for purposes other than those for which they were specifically intended;

(iii) if the student has signed a waiver of the student's right of access under this subsection in accordance with subparagraph (D), confidential recommendations—

(I) respecting admission to any educational agency or institution,

(II) respecting an application for employment, and

(III) respecting the receipt of an honor or honorary recognition.

(D) A student or a person applying for admission may waive his right of access to confidential statements described in clause (iii) of subparagraph (C), except that such waiver shall apply to recommendations only if (i) the student is, upon request, notified of the names of all persons making confidential recommendations and (ii) such recommendations are used solely for the purpose for which they were specifically intended. Such waivers may not be required as a condition for admission to, receipt of financial aid from, or receipt of any other services or benefits from such agency or institution.

(2) No funds shall be made available under any applicable program to any educational agency or institution unless the parents of students who are or have been in attendance at a school of such agency or at such institution are provided an opportunity for a hearing by such agency or institution, in accordance with regulations of the Secretary, to challenge the content of such student's education records, in order to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy rights of students, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading, or otherwise inappropriate data contained therein and to insert into such records a written explanation of the parents respecting the content of such records.

(3) For the purposes of this section the term "educational agency or institution" means any public or private agency or institution which is the recipient of funds under any applicable program.

(4) (A) For the purposes of this section, the term "education records" means, except as may be provided otherwise in subparagraph (B), those records, files, documents, and other materials which—

(i) contain information directly related to a student; and

(ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

(B) The term "education records" does not include—

(i) records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute;

(ii) records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement;

(iii) in the case of persons who are employed by an educational agency or institution but who are not in attendance at such agency or institution, records made and maintained in the normal course of business which relate exclusively to such person in that person's capacity as an employee and are not available for use for any other purpose; or

(iv) records on a student who is eighteen years of age or older, or is attending an institution of postsecondary education, which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student's choice.

(5)(A) For the purposes of this section the term "directory information" relating to a student includes the following: the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.

(B) Any educational agency or institution making public directory information shall give public notice of the categories of information which it has designated as such information with respect to each student attending the institution or agency and shall allow a reasonable period of

time after such notice has been given for a parent to inform the institution or agency that any or all of the information designated should not be released without the parent's prior consent.

(6) For the purposes of this section, the term "student" includes any person with respect to whom an educational agency or institution maintains education records or personally identifiable information, but does not include a person who has not been in attendance at such agency or institution.

(b) Release of education records; parental consent requirement; exceptions; compliance with judicial orders and subpoenas; audit and evaluation of Federally-supported education programs; recordkeeping

(1) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of educational records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) of this section) of students without the written consent of their parents to any individual, agency, or organization, other than to the following—

(A) other school officials, including teachers within the educational institution or local educational agency, who have been determined by such agency or institution to have legitimate educational interests, including the educational interests of the child for whom consent would otherwise be required;

(B) officials of other schools or school systems in which the student seeks or intends to enroll, upon condition that the student's parents be notified of the transfer, receive a copy of the record if desired, and have an opportunity for a hearing to challenge the content of the record;

(C)(i) authorized representatives of (I) the Comptroller General of the United States, (II) the Secretary, or (III) State educational authorities, under the conditions set forth in paragraph (3), or (ii) authorized representatives of the Attorney General for law enforcement purposes under the same conditions as apply to the Secretary under paragraph (3);

(D) in connection with a student's application for, or receipt of, financial aid;

(E) State and local officials or authorities to whom such information is specifically allowed to be reported or disclosed pursuant to State statute adopted—

(i) before November 19, 1974, if the allowed reporting or disclosure concerns the juvenile justice system and such system's ability to effectively serve the student whose records are released, or

(ii) after November 19, 1974, if—

(I) the allowed reporting or disclosure concerns the juvenile justice system and such system's ability to effectively serve, prior to adjudication, the student whose records are released; and

(II) the officials and authorities to whom such information is disclosed certify in writing to the educational agency or institution that the information will not be disclosed to any other party except as provided under State law without the prior written consent of the parent of the student;

(F) organizations conducting studies for, or on behalf of, educational agencies or institutions for the purpose of developing, validating, or administering predictive tests, administering student aid programs, and improving instruction, if such studies are conducted in such a manner as will not permit the personal identification of students and

their parents by persons other than representatives of such organizations and such information will be destroyed when no longer needed for the purpose for which it is conducted;

(G) accrediting organizations in order to carry out their accrediting functions;

(H) parents of a dependent student of such parents, as defined in section 152 of title 26;

(I) subject to regulations of the Secretary, in connection with an emergency, appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons; and

(J) (i) the entity or persons designated in a Federal grand jury subpoena, in which case the court shall order, for good cause shown, the educational agency or institution (and any officer, director, employee, agent, or attorney for such agency or institution) on which the subpoena is served, to not disclose to any person the existence or contents of the subpoena or any information furnished to the grand jury in response to the subpoena; and

(ii) the entity or persons designated in any other subpoena issued for a law enforcement purpose, in which case the court or other issuing agency may order, for good cause shown, the educational agency or institution (and any officer, director, employee, agent, or attorney for such agency or institution) on which the subpoena is served, to not disclose to any person the existence or contents of the subpoena or any information furnished in response to the subpoena.

Nothing in subparagraph (E) of this paragraph shall prevent a State from further limiting the number or type of State or local officials who will continue to have access thereunder.

(2) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information, or as is permitted under paragraph (1) of this subsection, unless—

(A) there is written consent from the student's parents specifying records to be released, the reasons for such release, and to whom, and with a copy of the records to be released to the student's parents and the student if desired by the parents, or

(B) except as provided in paragraph (1)(J), such information is furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena, upon condition that parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency.

(3) Nothing contained in this section shall preclude authorized representatives of (A) the Comptroller General of the United States, (B) the Secretary, or (C) State educational authorities from having access to student or other records which may be necessary in connection with the audit and evaluation of Federally-supported education programs, or in connection with the enforcement of the Federal legal requirements which relate to such programs: *Provided*, That except when collection of personally identifiable information is specifically authorized by Federal law, any data collected by such officials shall be protected in a manner which will not permit the personal identification of students and their parents by other than those officials, and such personally identifiable data shall be destroyed when no longer needed for such audit, evaluation, and enforcement of Federal legal requirements.

(4)(A) Each educational agency or institution shall maintain a record, kept with the education records of each student, which will indicate all individuals (other than those specified in paragraph (1)(A) of this subsection), agencies, or organizations which have requested or obtained access to a student's education records maintained by such educational agency or institution, and which will indicate specifically the legitimate interest that each such person, agency, or organization has in obtaining this information. Such record of access shall be available only to parents, to the school official and his assistants who are responsible for the custody of such records, and to persons or organizations authorized in, and under the conditions of, clauses (A) and (C) of paragraph (1) as a means of auditing the operation of the system.

(B) With respect to this subsection, personal information shall only be transferred to a third party on the condition that such party will not permit any other party to have access to such information without the written consent of the parents of the student. If a third party outside the educational agency or institution permits access to information in violation of paragraph (2)(A), or fails to destroy information in violation of paragraph (1)(F), the educational agency or institution shall be prohibited from permitting access to information from education records to that third party for a period of not less than five years.

(5) Nothing in this section shall be construed to prohibit State and local educational officials from having access to student or other records which may be necessary in connection with the audit and evaluation of any federally or State supported education program or in connection with the enforcement of the Federal legal requirements which relate to any such program, subject to the conditions specified in the proviso in paragraph (3).

(6)(A) Nothing in this section shall be construed to prohibit an institution of postsecondary education from

disclosing, to an alleged victim of any crime of violence (as that term is defined in section 16 of title 18), or a nonforcible sex offense, the final results of any disciplinary proceeding conducted by such institution against the alleged perpetrator of such crime or offense with respect to such crime or offense.

(B) Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing the final results of any disciplinary proceeding conducted by such institution against a student who is an alleged perpetrator of any crime of violence (as that term is defined in section 16 of title 18), or a nonforcible sex offense, if the institution determines as a result of that disciplinary proceeding that the student committed a violation of the institution's rules or policies with respect to such crime or offense.

(C) For the purpose of this paragraph, the final results of any disciplinary proceeding—

(i) shall include only the name of the student, the violation committed, and any sanction imposed by the institution on that student; and

(ii) may include the name of any other student, such as a victim or witness, only with the written consent of that other student.

(7)(A) Nothing in this section may be construed to prohibit an educational institution from disclosing information provided to the institution under section 14071 of title 42 concerning registered sex offenders who are required to register under such section.

(B) The Secretary shall take appropriate steps to notify educational institutions that disclosure of information described in subparagraph (A) is permitted.

(c) Surveys or data-gathering activities; regulations

Not later than 240 days after October 20, 1994, the Secretary shall adopt appropriate regulations or procedures, or identify existing regulations or procedures, which protect the rights of privacy of students and their families in connection with any surveys or data-gathering activities conducted, assisted, or authorized by the Secretary or an administrative head of an education agency. Regulations established under this subsection shall include provisions controlling the use, dissemination, and protection of such data. No survey or data-gathering activities shall be conducted by the Secretary, or an administrative head of an education agency under an applicable program, unless such activities are authorized by law.

(d) Students' rather than parents' permission or consent

For the purposes of this section, whenever a student has attained eighteen years of age, or is attending an institution of postsecondary education, the permission or consent required of and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student.

(e) Informing parents or students of rights under this section

No funds shall be made available under any applicable program to any educational agency or institution unless such agency or institution effectively informs the parents of students, or the students, if they are eighteen years of age or older, or are attending an institution of postsecondary education, of the rights accorded them by this section.

(f) Enforcement; termination of assistance

The Secretary shall take appropriate actions to enforce this section and to deal with violations of this section, in accordance with this chapter, except that action to terminate

assistance may be taken only if the Secretary finds there has been a failure to comply with this section, and he has determined that compliance cannot be secured by voluntary means.

(g) Office and review board; creation; functions

The Secretary shall establish or designate an office and review board within the Department for the purpose of investigating, processing, reviewing, and adjudicating violations of this section and complaints which may be filed concerning alleged violations of this section. Except for the conduct of hearings, none of the functions of the Secretary under this section shall be carried out in any of the regional offices of such Department.

(h) Certain disciplinary action information allowable

Nothing in this section shall prohibit an educational agency or institution from—

(1) including appropriate information in the education record of any student concerning disciplinary action taken against such student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community; or

(2) disclosing such information to teachers and school officials, including teachers and school officials in other schools, who have legitimate educational interests in the behavior of the student.

(i) Drug and alcohol violation disclosures

(1) In general

Nothing in this Act or the Higher Education Act of 1965 [20 U.S.C. 1001 *et seq.*] shall be construed to prohibit an institution of higher education from disclosing, to a parent or legal guardian of a student, information regarding any violation of any Federal, State, or local law, or of any rule or

policy of the institution, governing the use or possession of alcohol or a controlled substance, regardless of whether that information is contained in the student's education records, if—

(A) the student is under the age of 21; and

(B) the institution determines that the student has committed a disciplinary violation with respect to such use or possession.

(2) State law regarding disclosure

Nothing in paragraph (1) shall be construed to supersede any provision of State law that prohibits an institution of higher education from making the disclosure described in subsection (a) of this section.

(j) Investigation and prosecution of terrorism

(1) In general

Notwithstanding subsections (a) through (i) or any provision of State law, the Attorney General (or any Federal officer or employee, in a position not lower than an Assistant Attorney General, designated by the Attorney General) may submit a written application to a court of competent jurisdiction for an ex parte order requiring an educational agency or institution to permit the Attorney General (or his designee) to—

(A) collect education records in the possession of the educational agency or institution that are relevant to an authorized investigation or prosecution of an offense listed in section 2332b(g)(5)(B) of title 18 United States Code, or an act of domestic or international terrorism as defined in section 2331 of that title; and

(B) for official purposes related to the investigation or prosecution of an offense described in paragraph (1)(A), retain, disseminate, and use (including as evidence at trial or

in other administrative or judicial proceedings) such records, consistent with such guidelines as the Attorney General, after consultation with the Secretary, shall issue to protect confidentiality.

(2) Application and approval

(A) In general. An application under paragraph (1) shall certify that there are specific and articulable facts giving reason to believe that the education records are likely to contain information described in paragraph (1)(A).

(B) The court shall issue an order described in paragraph (1) if the court finds that the application for the order includes the certification described in subparagraph (A).

(3) Protection of educational agency or institution

An educational agency or institution that, in good faith, produces education records in accordance with an order issued under this subsection shall not be liable to any person for that production.

(4) Record-keeping

Subsection (b)(4) does not apply to education records subject to a court order under this subsection.

20 U.S.C. § 1232i (2000), provides, in relevant part:

§ 1232i. Limitations on withholding of Federal assistance

(a) Refusal to supply personal data on students or families

Except as provided in section in section 1232g(b)(1)(D) of this title, the refusal of a State or local educational agency or institution of higher education, community college, school, agency offering a preschool program, or other educational institution to provide personally identifiable data on students or their families, as a part of any applicable program, to any Federal office, agency, department, or other third party, on the grounds that . constitutes a violation of the right to privacy and confidentiality of students or their parents, shall not constitute sufficient grounds for the suspension or termination of Federal assistance. Such a refusal shall also not constitute sufficient grounds for a denial of, a refusal to consider, or a delay in the consideration of, funding for such a recipient in succeeding fiscal years. In the case of any dispute arising under this section, reasonable notice and opportunity for a hearing shall be afforded the applicant.

20 U.S.C. § 1234 (2000), provides, in relevant part:

§ 1234. Office of Administrative Law Judges

(a) Establishment; duties

The Secretary shall establish in the Department of Education an Office of Administrative Law Judges (hereinafter in this subchapter referred to as the "Office") which shall conduct—

(1) recovery of funds hearings pursuant to section 1234a of this title,

(2) withholding hearings pursuant to section 1234d of this title,

(3) cease and desist hearings pursuant to section 1234e of this title, and

(4) other proceedings designated by the Secretary.

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20 U.S.C. § 1234c (2000) provides:

§ 1234c. Remedies for existing violations

(a) Whenever the Secretary has reason to believe that any recipient of funds under any applicable program is failing to comply substantially with any requirement of law applicable to such funds the Secretary may—

(1) withhold further payments under that program, as authorized by section 1234d of this title;

(2) issue a complaint to compel compliance through a cease and desist order of the Office, as authorized by section 1234e of this title;

(3) enter into a compliance agreement with a recipient to bring it into compliance, as authorized by section 1234f of this title; or

(4) take any other action authorized by law with respect to the recipient.

(b) Any action, or failure to take action, by the Secretary under this section shall not preclude the Secretary from seeking a recovery of funds under section 1234a of this title.

20 U.S.C. § 1234d (2000), provides:

§ 1234d. Withholding

(a) Discretionary withholding

In accordance with section 1234c of this title, the Secretary may withhold from a recipient, in whole or in part, further payments (including payments for administrative costs) under an applicable program

(b) Notice requirements

Before withholding payments, the Secretary shall notify the recipient, in writing, of—

(1) the intent to withhold payments;

(2) the factual and legal basis for the Secretary's belief that the recipient has failed to comply substantially with a requirement of law; and

(3) an opportunity for a hearing to be held on a date at least 30 days after the notification has been sent to the recipient.

(c) Hearing

The hearing shall be held before the Office and shall be conducted in accordance with the rules prescribed pursuant to subsections (f) and (g) of section 1234 of this title.

(d) Suspension of payments

Pending the outcome of any hearing under this section, the Secretary may suspend payments to a recipient, suspend the authority of the recipient to obligate Federal funds, or both, after such recipient has been given reasonable notice and an opportunity to show cause why future payments or authority to obligate Federal funds should not be suspended.

(e) Findings of fact.

Upon review of a decision of the Office by the Secretary, the findings of fact by the Office, if supported by substantial evidence, shall be conclusive. However, the Secretary, for good cause shown, may remand the case to the Office to take further evidence, and the Office may thereupon make new or modified findings of fact and may modify its previous action. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(f) Final agency action

The decision of the Office in any hearing under this section shall become final agency action 60 days after the recipient receives written notice of the decision unless the Secretary either—

(1) modifies or sets aside the decision, in whole or in part, in which case the decision of the Secretary shall become final agency action when the recipient receives written notice of the Secretary's action; or

(2) remands the decision of the Office.

20 U.S.C. § 1234e (2000), provides:

§ 1234e. Cease and desist orders

(a) Issuance and contents of complaint

In accordance with section 1234c of this title, the Secretary may issue to a recipient under an applicable program a complaint which—

(1) describes the factual and legal basis for the Secretary's belief that the recipient is failing to comply substantially with a requirement of law; and

(2) contains a notice of a hearing to be held before the Office on a date at least 30 days after the service of the complaint.

(b) Appearance contesting order

The recipient upon which a complaint has been served shall have the right to appear before the Office on the date specified and to show cause why an order should not be entered by the Office requiring the recipient to cease and desist from the violation of law charged in the complaint.

(c) Report; issuance of cease and desist order

The testimony in any hearing held under this section shall be reduced to writing and filed with the Office. If upon that hearing the Office is of the opinion that the recipient is in violation of any requirement of law as charged in the complaint, the Office shall—

(1) make a report in writing stating its findings of fact; and

(2) issue to the recipient an order requiring the recipient to cease and desist from the practice, policy, or procedure which resulted in the violation.

(d) Report and order as final agency action

The report and order of the Office under this section shall become the final agency action when the recipient receives the report and order.

(e) Enforcement of final order

The Secretary may enforce a final order of the Office under this section which becomes final agency action by—

(1) withholding from the recipient any portion of the amount payable to it, including the amount payable for administrative costs, under the applicable program; or

(2) certifying the facts to the Attorney General who shall cause an appropriate proceeding to be brought for the enforcement of the order.

20 U.S.C. § 1234f (2000), provides:

§ 1234f. Compliance agreements

(a) Discretionary authority; purposes of agreements

In accordance with section 1234c of this title, the Secretary may enter into a compliance agreement with a recipient under an applicable program. The purpose of any compliance agreement under this section shall be to bring the recipient into full compliance with the applicable requirements of law as soon as feasible and not to excuse or remedy past violations of such requirements.

(b) Procedures applicable

(1) Before entering into a compliance agreement with a recipient, the Secretary shall hold a hearing at which the recipient, affected students and parents or their representatives, and other interested parties are invited to participate. The recipient shall have the burden of persuading the Secretary that full compliance with the applicable requirements of law is not feasible until a future date.

(2) If the Secretary determines, on the basis of all the evidence presented, that full compliance is genuinely not feasible until a future date, the Secretary shall make written findings to that effect and shall publish those findings, along with the substance of any compliance agreement, in the Federal Register.

(c) Contents

A compliance agreement under this section shall contain—

(1) an expiration date not later than 3 years from the date of the written findings under subsection (b)(2) of this section, by which the recipient shall be in full compliance with the applicable requirements of law, and

(2) those terms and conditions with which the recipient must comply until it is in full compliance.

(d) Failure of recipient to comply with terms and conditions

If a recipient fails to comply with the terms and conditions of a compliance agreement under this section, the Secretary may consider that compliance agreement to be no longer in effect, and the Secretary may take any action authorized by law with respect to the recipient.

20 U.S.C. § 1234g (2000), provides:

§ 1234g. Judicial review

(a) Recipients entitled to review; stay of action by Secretary

Any recipient of funds under an applicable program that would be adversely affected by a final agency action under section 1234a, 1234d, or 1234e of this title, and any State entitled to receive funds under a program described in section 1232d(a) of this title whose application has been disapproved by the Secretary, shall be entitled to judicial review of such action in accordance with the provisions of this section. The Secretary may not take any action on the basis of a final agency action until judicial review is completed.

(b) Petition for review; filing of record

A recipient that desires judicial review of an action described in subsection (a) of this section shall, within 60 days of that action, file with the United States Court of Appeals for the circuit in which that recipient is located, a petition for review of such action. A copy of the petition shall be transmitted by the clerk of the court to the Secretary. The Secretary shall file in the court the record of the proceedings on which the action was based, as provided in section 2112 of title 28.

(c) Findings of fact

The findings of fact by the Office, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Office to take further evidence, and the Office may make new or modified findings of fact and may modify its previous action, and shall certify to the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(d) Scope of review; Review by Supreme Court

The court shall have jurisdiction to affirm the action of the Office or the Secretary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.